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No. 87-1310

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EAST KENTUCKY ENERGY CORPORATION,
ONEIDA COAL COMPANY, INC., and
SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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REPLY BRIEF FOR PETITIONERS

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1. The court below upheld a system under which Petitioners' property was taxed at a level as much as 6,500 percent higher than the level of property found by the trial court to be comparable.[1] This startling disparity was not based on any subjective valuation judgment, since the assessor expressly did not consider the respective characteristics of the properties in appraising them for tax purposes. Respondent County Commission concedes the point, *see* Resp. Br. at 2-3, the Circuit Court so found, Pet. App. 29a, 59a, and the Supreme Court of Appeals did not disturb those findings on appeal. *See* Pet. App. 6a. Nor was the disparity based on any classi-

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[1] The statement required by Rule 28.1 appears at Pet. App. 105a.

fication of property under state law, since it is undisputed that Petitioners' property and the comparable parcels were classified the same under state law for tax purposes. *See* Pet. at 16 n.7.

2. Respondent, citing testimony before the County Commission, bases its opposition to certiorari on the new argument that Petitioners' property was not comparable to other coal property in Webster County. *See* Resp. Br. at 12 & App. A. But it is far too late in the day to reargue the facts. Respondent contends that the list of comparable properties relied upon by the Circuit Court below to show the patent discrimination "was a *mere compilation* of the values on the land books *without regard* to the *location, topography, accessibility or other factors* that may affect market value." Resp. Br. at 13 (emphasis in original). What the Circuit Court found, and what was undisturbed on appeal, was that the other properties *were* comparable "in topography, location, access, development, mineral content and forestation." Pet. App. 16a.

Respondent argues—contrary to fact—that some difference between Petitioners' property and other coal property in Webster County can explain the disparity of 6,500 percent in appraisal. Again, the findings of fact below, undisturbed on appeal, could not be more explicit in refuting any such contention:

> The questioned assessments were not based upon the presence of economically minable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon the [comparable] properties.
>
> The questioned assessments were not based upon present use or immediately foreseeable economic development of petitioners' real estate. The assessor did not consider the size, shape, locations, access, or availability of public highways, sewers, water, gas or electricity in assessing either the petitioners' real

> estate or the real estate listed in the Exhibit B or G comparables. [Pet. App. 29a; *see* Pet. App. 59a.]

Indeed, while Respondent now argues that Petitioners' property is distinguishable from the other coal property in Webster County, the assessor below eschewed any such contention: "Upon examination, the assessor did not contend that petitioners' assessment was the result of unique or valuable features peculiar only to petitioners' land." Pet. App. 30a, 59a. In fact, Respondent itself *stipulated* below to the admission of the list of comparable properties. *See* Pet. App. 21a, 24a, 29a, 90a.

In any event, there is nothing in the testimony before the Commission—which was of course available to the Circuit Court when it found the other properties comparable to Petitioners' property in every pertinent respect—that undermines the validity of the comparison of the tax assessments. The expert witness Mullenex expressly stated that the properties were comparable geologically, Resp. Br. App. 6a, 9a, and that the "same coal seams" on Petitioner's property "are present on all the other properties." *Id.* at 10a. Respondent cannot escape the undisturbed finding that the properties were comparable, and cannot escape the glaring discriminatory taxation shown on the undisputed record.[2]

3. With respect to the law, Respondent relies most heavily on a 1984 decision of the court below. The divided decision in *Kline* v. *McCloud*, 326 S.E.2d 715 (W. Va. 1984), at most shows that the decision below was no fluke, and that the position of the court below is firmly established. As noted in the Petition, Pet. at 18-21, 23-25, that firmly established position conflicts not only

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[2] Respondent states that the court below "found" that the assessor raised the assessment of unsold property by ten percent in certain years. Resp. Br. at 13. The court made no such finding, as is clear from the page cited by Respondent, Pet. App. 6a. And in fact the assessor made only occasional *de minimis* adjustments in the assessments of unsold property. Pet. App. 27a-28a, 58a. In any event, the record of overwhelming disparity in taxation already took into account any such increases. *See* Pet. App. 20a, 22a.

with decisions of this Court, but with decisions of other federal courts and state courts of last resort.[3]

Respondent also relies upon three decisions of this Court: *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517 (1933); *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522 (1959); and *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). None of these cases is pertinent. Each considered the reasonableness of classification of property under state law for tax purposes: *Liggett* between local and chain stores, *Allied Stores* between warehoused merchandise owned by residents and that owned by nonresidents, and *Lehnhausen* between corporations and individuals. As noted, no such issue is presented in this case. West Virginia law draws *no* distinction for tax purposes between Petitioners' property and the property found below to be comparable. Indeed, state law mandates that the properties be treated the same for tax purposes—appraised and assessed on the same basis, and taxed at the same rate. *See* W. Va. Const. art. 10, § 1; W. Va. Code 11-3-1. Yet Petitioners' property, because of the discriminatory appraisal system, was taxed at a level 6,500 percent higher than other property. That disparity was based on discrimination, not classification.

4. Respondent's opposition frames the second question presented by Petitioners in stark form:

> [T]he respondents do agree that it is the settled law of the State of West Virginia that if a taxpayers property is assessed at market value, if the taxpayer believes that other property is not assessed at market value, his remedy is to compel the other

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[3] Curiously, Respondent seems to suggest that the ultimate vote below was 4-1 rather than 3-2. *See* Resp. Br. at 5. Justice Neely, who dissented in *Kline*—the case on which Respondent relies—also joined Justice Brotherton when he filed his dissent below. Pet. App. 11a. *See* Pet. at 10 & n.4; *Kline* v. *McCloud*, 326 S.E.2d at 725-727 (Neely, C.J., dissenting).

> assessments to be raised and he is not entitled to have it lowered. [Resp. Br. at 14.]

The contrast with what this Court has repeatedly held could not be clearer. *See, e.g., Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931) ("it is well settled that a taxpayer who has been subjected to discriminatory taxation * * * cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid"); *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946) ("The constitutional requirement * * * is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class").

Contrary to the Respondent's contention, *Liggett* does not support the court below. The taxpayer's claim there was that a few taxpayers were avoiding paying any tax, not that it paid taxes at a discriminatory level compared to all other taxpayers. 288 U.S. at 539. Indeed, the Court expressly reaffirmed the principles applicable to a case such as the present one: "[I]n the case of unequal and discriminatory assessment, to hold that the complaining taxpayer's only remedy is to have the assessments on all the other property raised to a level equal with that of his own is in effect to deny any remedy whatever." *Id.* at 540.

5. Respondent acknowledges that the appraisal approach that resulted in the dramatic disparity shown on the record was the consistent "policy" of the assessor. Resp. Br. at 2. Respondent also confirms that the only remedy for Petitioners is to seek to raise the assessments of all other property. *Id.* at 14. Finally, Respondent does not dispute that the questions presented are important and recurring. *See* Pet. at 25-27. Respondent's Brief in Opposition amply confirms the pressing need for review by this Court.

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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